CRIME AND DELINQUENCY TOPICS:

A Monograph Series

Civil Commitment of Special Categories of Offenders

A Review of the Literature and Court Decisions

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Foreword

This monograph is one of a series of literature reviews and evaluative discussions on current topics of significance in the area of crime and delinquency. These monographs are designed to inform program administrators, policy makers, and other interested persons about significant findings to date which may be useful in the development and improvement of programs in the crime and delinquency area, and about research gaps and needs.

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Introduction

The literature on the civil commitment of offenders and persons suspected of being potential offenders under special statutes directed at psychopaths, defective delinquents, sexual psychopathic offenders, narcotic addicts, and chronic alcoholics is, in general, severely critical of these procedures and statutes. The aim of the special statutes—to provide treatment for "psychopathic" persons and thus protect society from serious crimes—is beyond reproach. However, such statutes have been repeatedly criticized on legal grounds, such as inadequate due process of law, as well as for the results achieved, which are very different from those originally intended, such as protection against dangerous offenders. The civil commitment of narcotic addicts and chronic alcoholics, whose "offenses" have no victims, is criticized as being punitive without aiding those committed. These civil commitment procedures do not employ the due process safeguards that are utilized in criminal procedure to protect the rights of the accused.

Civil Commitment and Special Statutes

A basic legal objection to the civil commitment procedures used against the categories of offenders and suspected potential offenders discussed here is the lack of due process provided by these statutes. Sol Rubin has emphasized that civil commitment procedures as applied in cases of sexual psychopaths and drug addicts are in fact quasi-criminal, that is, they involve individuals who might be proceeded against criminally, or who may come before criminal courts, and are called civil only to enable the State to deal with persons by procedures less demanding than criminal procedure. The characterization of these quasi-criminal commitments as "civil" is, Rubin says, a legal fiction based upon a myth of treatment.[1]

One fundamental legal objection to the special statutes under which so-called psychopathic personalities and sexual psychopaths are civilly committed is that they are too vague in both concept and terminology. Leonard Kaplan, in an article in the *Boston University Law Review*, discusses due process and vague terminology and points out that, because of almost insurmountable problems of definition, most involuntary civil commitment laws

[1] Rubin, Sol. *Psychiatry and Criminal Law: Illusions, Fictions, and Myths.* Dobbs Ferry, New York: Oceana, 1965. 219 pp.

do not adequately safeguard the rights of the individual who is subjected to the process.[2] Alan Dershowitz stresses that even in those jurisdictions with legal sounding criteria, such as the District of Columbia where the committed person must be mentally ill and likely to injure himself or others, the operative phrases are too vague.[3]

The vagueness of the meaning of the terms employed in these special statutes is a direct consequence of the incorporation of broad psychiatric concepts into the legal process, as is pointed out by Rubin, Kaplan, and Dershowitz in the works cited. Joseph Livermore, Carl Malmquist, and Paul Meehl in discussing civil commitment emphasize the unavoidably ambiguous generalities with which the American Psychiatric Association describes its diagnostic categories and the consequences of such vagueness for civil commitment.[4] *Psychiatric Aspects of Criminology,* edited by Seymour Halleck and Walter Bromberg, defines some of the problems that have arisen as a result of the introduction of psychiatry into the legal system and considers the theoretical and practical contributions of psychiatry to criminology.[5] Sol Rubin, in an article in the *International Journal of Psychiatry,* writes of the influence of psychiatrists in penology and criminology. He maintains that their efforts, however well intended, have been a history of error and confusion and that their campaign for hospital treatment for the criminally insane has produced institutions more oppressive than prisons.[6]

Another legal problem related to the infusion of psychiatric concepts into criminology is the question of a right to treatment. A symposium on this question was published in the *Georgetown Law Journal.*[7] Ten papers are presented which offer an excellent survey of the complexities of this single problem area. The grave inadequacies or the absence of treatment provided persons civilly committed is of course significant in any discussion of a legal right to commit ostensibly for treatment. The amount of treatment available to a committed person which would supposedly justify an indeterminate commitment is questioned in *Psychiatric Aspects of Criminology.*[8] Rubin questions the notion that treat-

[2] Kaplan, Leonard V. Civil commitment: As you like it. *Boston University Law Review,* 49(1):14-45, 1969.

[3] Dershowitz, Alan M. Psychiatry in the legal process: a knife that cuts both ways. *Judicature,* 51(10):370-377, 1968.

[4] Livermore, Joseph M., and others. On the justifications for civil commitment. *University of Pennsylvania Law Review,* 117(1):75-96, 1968.

[5] Halleck, Seymour L., and Bromberg, Walter. *Psychiatric Aspects of Criminology.* Springfield, Ill.: Charles C Thomas, 1968. 82 pp.

[6] Rubin, Sol. Psychiatry and the prison: a negative report. *Internatinal Journal of Psychiatry,* 6(3):214-218, 1968.

[7] Bazelon, David L., and others. A symposium—the right to treatment. *Georgetown Law Journal,* 57(4):673-891, 1969.

[8] *Op. cit., supra* note 5.

ment is not enough. Even if treatment is available and even if treatment is needed, those conditions alone do not justify commitment. . . . There is a right not to be treated."[9]

The validity of status crimes, such as drug addiction, presented another problem. *Robinson* v. *California*, which held that to punish a person for narcotic addiction constitutes cruel and unusual punishment, has broad significance in this area. Dale Broeder and Robert Merson review the many implications of *Robinson*.[10] Anthony Cuomo suggests that a review of status crimes (narcotics and alcohol addiction, vagrancy, sexual psychopathy, and habitual criminality) indicates the abandonment of the *mens rea* (criminal intent) concept in defining crime.[11]

Civil commitment under these special statutes of persons who are neither convicted of nor even charged with an offense to institutions where treatment is practically nonexistent is a procedure open to even wider criticism than civil commitment of persons convicted of offenses. How does one justify commitment of a person capable of taking care of himself and not dangerous to society to a treatment facility which is such in name only?

Hawaii has recently made it impossible to obtain a court order requiring persons who are mentally ill or habituated to the excessive use of drugs or alcohol to be hospitalized, except in connection with a criminal or juvenile action. Initial admission to a licensed psychiatric facility of persons who are habituated to the excessive use of drugs or alcohol, to an extent requiring hospitalization, except in cases arising out of criminal or juvenile proceedings, is effected solely by the administrator of the psychiatric facility involved, or his deputy, and licensed physicians, with an occasional extra party as an applicant. There is no court involvement. This procedure is considered in Hawaii to be more progressive than civil commitment.[12]

Psychopathic Offender and Defective Delinquent Laws

In *The Psychopath: An Essay on the Criminal Mind*, William and Joan McCord examine the concept of a psychopathic syndrome. They report that "most social scientists postulate a common core of psychopathy with which many would agree: the psy-

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[9] Rubin, Sol. Illusions of treatment in sentences and civil commitments. *Crime and Delinquency*, 16(1):79–92, 1970.

[10] Broeder, Dale W., and Merson, Robert Wade. Robinson v. California: an abbreviated study. *American Criminal Law Quarterly*, 3(4):203–207, 1965.

[11] Cuomo, Anthony A. Mens rea and status criminality. *Southern California Law Review*, 40(3):463–526, 1967.

[12] King, Samuel P. The role of the court in treatment of the addicted or mentally ill. *Judicature*, 52(2):71–72, 1968.

chopath is an asocial, aggressive, highly impulsive person who feels little or no guilt and is unable to form lasting bonds of affection with human beings." [13] Seymour Halleck tells us in *Psychopathy, Freedom and Criminal Behavior* that since the psychopath is not concerned with the opinions of others, his behavior may be antisocial. He is an activist who, in his efforts to mold the world to his own needs, often finds that it is necessary to violate the law.[14]

The 1965 Midwestern Governors' Conference was a workshop on the mentally disordered offender, including the psychopath, at which delegates from 12 midwestern States participated. Among the conclusions drawn was that there is a great variance in legal definitions in the various States relative to trial and commitment procedures.[15] Ohio's Ascherman Act, which makes no distinction between the abnormal sex offender and the mentally ill and psychopathic offenders, is discussed in three articles in the *University of Cincinnati Law Review,* Winter 1965. The Act is criticized as inflexible and revision is recommended in the light of new and different insights into the problem of the abnormal sex offender and the so-called psychopathic offender.[16, 17, 18]

Massachusetts has been concerned with preventive laws since 1911 when its original "defective delinquent" legislation was passed.[19] The best known defective delinquent statute today is the Maryland law. An article in the *Rutgers Law Review* contends that the Maryland defective delinquent statute and similar laws raise important constitutional issues which require critical examination and that legislators should accept and discharge the additional responsibility of overseeing the operation of such laws and re-evaluating the efficiency with which psychiatrists can predict the course of human behavior.[20] Miriam Gafni and Barney Welsh contend that the Maryland defective delinquent statute granted procedural due process from the outset, but that the Pennsylvania

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[13] McCord, William, and McCord, Joan. *The Psychopath: An Essay on the Criminal Mind.* Princeton, New Jersey: Van Nostrand, 1964. p. 3.

[14] Halleck, Seymour L. Psychopathy, freedom and criminal behavior. *Bulletin of the Menninger Clinic,* 30(3):127-140, 1966.

[15] Midwestern Governors' Conference. *Proceedings: Interstate Workshop in the Mentally Disordered Offender.* Minneapolis, 1964. 159 pp.

[16] The sociopathic criminal offender: what to do with him? *University of Cincinnati Law Review,* 34(1):1-52, 1965.

[17] Reckless, Walter C. Recommendation for revision of the Ascherman Act to more discriminatingly deal with abnormal offenders. *University of Cincinnati Law Review,* 34(1):54-57, 1965.

[18] Seeman, William. Behavioral science: M'Naghten and the sociopathic offender. *University of Cincinnati Law Review,* 34(1):58-64, 1965.

[19] Sarafian, Robert A. Treatment of the criminally dangerous sex offender. *Federal Probation,* 27(1):52-59, 1963.

[20] Defective delinquent and habitual criminal offender statutes: required constitutional safeguards. *Rutgers Law Review,* 20 (4):756-788, 1966.

tions and should be ruled unconstitutional.[21]

Sexual Psychopath, Sexually Dangerous Persons, and Sexual Offender Laws

An analysis of persons adjudged sexual psychopaths in California is contained in *Sex Offenders: An Analysis of Types* by Paul Gebhard and others. They suggest that "the concept of sexual psychopathy is vague and probably invalid from a psychiatric and scientific viewpoint, but has a certain practical utility in sorting out those patients who are more likely to benefit from treatment." [22] Our concern here is not so much whether the concept is valid, but rather whether the special statutes enacted for the commitment of persons deemed sexual psychopaths operate to accomplish their intended purpose, and if they do not, whether such statutes are desirable at all. Roger Craig, in his paper on sexual psychopath legislation prepared for the President's Commission on Law Enforcement and Administration of Justice, reviews the background of such statutes, describes how the statutes operate, offers a critical evaluation of the statutes and, among other recommendations, suggests the repeal of these statutes. During the past three decades, approximately 30 States and the District of Columbia have enacted special legislation establishing commitment procedures for sex offenders or potential sex offenders who, although not insane, are defined as mentally abnormal.[23] The Iowa and California Sexual Psychopath Laws are explained in Ralph Slovenko's *Sexual Behavior and the Law*.[24]

Such laws have frequently been enacted following a particularly outrageous sex crime, but the writers doubt that they protect society from such horrors. The most severe criticism of these statutes is that persons committed under the provisions of these statutes tend to be selected on the basis of their amenability to treatment rather than on the basis of dangerousness. The authors of *Sex Offenders* note that if the primary function of these laws is to segregate the dangerous, their objective is not being achieved, for some of the most dangerous men are those rejected as sexual psychopaths merely because they are not amenable to treatment, while some of the least dangerous (e.g., homosexual

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[21] Gafni, Miriam, and Welsh, Barney B. Post conviction problems and the defective delinquent. *Villanova Law Review*, 12(3):545–602, 1967.

[22] Gebhard, Paul H., and others. *Sex Offenders: An Analysis of Types*. New York: Harper and Row, 1965. p. 867.

[23] Craig, Roger. *Sexual Psychopath Legislation*. Submitted to the President's Commission on Law Enforcement and Administration of Justice. Washington, D.C., 1967. p. 1.

[24] Slovenko, Ralph. *Sexual Behavior and the Law*. Springield, Ill.: Charles C Thomas, 1965. 886 pp.

offenders) are retained.[25] Morris Ploscowe made the same point earlier in *Sex and the Law*.[26] Roger Craig writes that "the majority of offenders committed under the statutes are relatively minor deviates." [27] Although the validity of the psychiatric concept of sexual psychopathy is debatable, authorities have known for some time that many of the popular beliefs about sex offenders are decidedly false. Morris Ploscowe, after reviewing several studies of sex offenders, wrote that "sex crime is not habitual behavior with the majority of sex offenders." [28] Craig, as well as a number of others before him, maintains that sex offenders do not progress from minor sexual offenses to more serious offenses.[29]

Repeal of these statutes is urged by Rubin [30] and Paul Tappan [31] as well as by Craig. Robert Sadoff in *Psychiatric Views of the Sexual Psychopath Statutes* contends that the sexual psychopath statutes, although inadequate, have served a useful purpose and should be used as a beginning for more adequate legislation.[32] The approach of the National Council on Crime and Delinquency to these problems is made clear in its *Model Sentencing Act* [33] which urges sentencing on the basis of dangerousness as a more effective means of protecting society than the use of special statutes.

Massachusetts is among those States that now use the term sexually dangerous person rather than sexual psychopath. The Massachusetts Sexually Dangerous Person statute has been criticized by Donald Gould and Irving Hurwitz who suggest that the ambiguity of the definition of a sexually dangerous person should be removed from the law and that the statute violates constitutional rights.[34]

Gerald Chiss in an article on the Illinois Sexually Dangerous Persons Act maintains that the legislature should at least narrow down the class of offenders subject to the statute by limiting the offenses which come under the proceedings to crimes of violence and crimes involving young victims.[35]

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[25] *Op. cit., supra* note 22, p. 866.

[26] Ploscowe, Morris. *Sex and the Law*. New York: Prentice-Hall, 1951. p. 277.

[27] *Op. cit., supra* note 23, p. 12.

[28] *Op. cit., supra* note 26, p. 218.

[29] *Op. cit., supra* note 23, p. 8.

[30] *Op. cit., supra* note 1, p. 105.

[31] Tappan, Paul. Some myths about the sex offender. *Federal Probation*, 19(2):7–12, 1955.

[32] Sadoff, Robert L. Psychiatric views of the sexual psychopath statutes. *Corrective Psychiatry and Journal of Social Therapy*. 12(4):301–314, 1966.

[33] National Council on Crime and Delinquency. *Model Sentencing Act*. New York: The Council, 1963. 35 pp.

[34] Gould, Donald B., and Hurwitz, Irving L. Out of tune with the times: The Massachusetts SDP statute. *Boston University Law Review*, 45(3):391–415, 1965.

[35] Chiss, Gerald D. This Illinois Sexually Dangerous Persons Act. *University of Illinois Law Forum*, No. 2, 449–459, 1966.

Anthony and Susan Granucci in a recent study of the operation of the Indiana Sexual Psychopath Act contend that the statute has not been used to incarcerate nuisance offenders, but has been focused on those who are violent or offend against children. They also point out that those who are committed are, on the whole, being treated and released with dispatch.[36]

In a study of "sexual psychopath" patients treated at Atascadero State Hospital in California, Louise Frisbie found that "of 1,921 treated 'sexual psychopath' patients, three-fourths had not reverted to sexually deviant behavior as measured by a new sex offense conviction within a 5-year period." [37] The study indicated that the most dangerous offenders, except for rapists, were the least recidivistic, and that the types of offenders with higher cumulative recidivism rates were less menacing to society. The findings of this study tended to partially refute the idea that sex offenders become progressively more dangerous. An article written by Michael Nasatir and others maintains that professional treatment is grossly inadequate at the Atascadero State Hospital and that incarceration there in many ways is not unlike imprisonment.[38]

If those persons thought to be amenable to treatment are the most likely to be proceeded against under the special statutes, low recidivism rates should not be surprising, particularly as Morris Ploscowe has pointed out that "sex crime is not habitual behavior with the majority of sex offenders." [39]

Further, as there is little treatment provided in the institutions to which "sexual psychopaths" are committed, more research into the comparative recidivism rates of treated and untreated "sexual psychopaths" is needed.

A number of States have general Sex Offender Acts which are not directed specifically toward the "sexual psychopath." Lawrence Dimmitt reviews the Kansas Sexual Offender Act and its administration in the *Washburn Law Journal*.[40] The Kansas Act can be applied to any offender found by the court to be "mentally ill." The author maintains that sexual offender legislation has generally failed to provide an effective means of controlling and treating mentally disordered offenders and that there appears to be no real need for such specific legislation.

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[36] Granucci, Anthony, and Granucci, Susan Jamart. Indiana's Sexual Psychopath Act in operation. *Indiana Law Journal*. 44(4):555–594, 1969.

[37] Frisbie, Louise Viets. Treated sex offenders who reverted to sexually deviant behavior. *Federal Probation*, 29(2):52–57, 1965.

[38] Nasatir, Michael, and others. Atascadero: Ramifications of a maximum security treatment institution. *Issues in Criminology*, 2(1):29–46, 1966.

[39] *Op. cit., supra* note 26, p. 218.

[40] Dimmit, Lawrence A. The Kansas Sexual Offender Act and its administration. *Washburn Law Journal*, 8(1):21–47, 1968.

The Wisconsin Public Welfare Department published a study of Wisconsin's experience with its Sex Crimes Law from July 1951 through June 1963. The report contains 16 tables briefly summarized textually, indicating findings concerning the total number of offenders committed under the Sex Crimes Law and those classed as deviates.[41]

In a study of the New Jersey Sex Law, Ralph Brancale maintains that the New Jersey law attempts to respect constitutional rights and avoid a witchhunt psychology. He feels that this legislation, despite administrative difficulties, is enlightened in penological practices and that the results of its operations are positive. Only about one percent of the offenders previously placed under the statute and treated on an ambulatory or institutional basis seem to have committed new offenses.[42]

Civil Commitment of Narcotic Addicts

Although the *Robinson* decision of the U.S. Supreme Court prevents punishing a person for the status of drug addiction, in its dictum the Court approved civil commitment of narcotic addicts, by a "fiction of treatment that is contradicted by matter-of-fact truth. In California and New York, the principal jurisdictions using civil commitment of drug addicts, the systems for it are in reality no different from prison systems."[43] In the Task Force report on *Narcotics and Drug Abuse* of the President's Commission on Law Enforcement and Administration of Justice, it is stated that "the Commission believes that involuntary civil commitment offers sufficient promise to warrant a fair test. But it must not become the civil equivalent of imprisonment."[44] Dennis Aronowitz in an appendix to that report writes with regard to involuntary civil commitment of noncriminal addicts "that at this time the Federal Government should neither adopt a program for involuntary commitment of noncriminal addicts, nor should it urge the States to adopt such programs or support them financially or otherwise."[45] He also makes suggestions with regard to involuntary commitment of criminal addicts and voluntary commitment of both criminal and noncriminal addicts.

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[41] Wisconsin Public Welfare Department. *Wisconsin's First Eleven Years of Experience With Its Sex Crimes Law, July 1951 Through June 1963.* Madison, 1965.

[42] Brancale, Ralph. The sex offenders: Report on the New Jersey development. In: Reckless, Walter C., and Newman, Charles L., eds. American Society of Criminology. *Interdisciplinary Problems in Criminology: Papers of the American Society of Criminology, 1964.* Louisville, Kentucky: The Society, 1965. pp. 151–158.

[43] *Op. cit., supra* note 9, p. 86.

[44] U.S. President's Commission on Law Enforcement and Administration of Justice. *Task Force Report: Narcotics and Drug Abuse.* Washington, D.C.: U.S. Government Printing Office, 1967. p. 17.

[45] *Ibid.*, p. 153.

narcotic addicts do not in fact rectify the injustices of the outdated Uniform Narcotic Laws and must be revised. He contends that the best treatment for drug addiction is not long confinement, although confinement for some period is necessary.[46] In light of the recent experiments in the treatment of narcotic addicts with methadone,[47] involuntary confinement for any period of time may by unnecessary for many addicts.

The House Committee on the Judiciary of the U.S. Congress published its hearings on *Civil Commitment and Treatment of Narcotic Addicts* in 1966. The hearings, 465 pages long, contain texts of bills providing for the civil commitment and treatment of narcotic addicts and statements by Congressmen and experts on the problem of narcotic addiction.[48] The Federal Narcotics Addict Rehabilitation Act of 1966 is reviewed by Arch Sayler in *Corrective Psychiatry and Journal of Social Therapy*.[49] This article describes the law and the specifications for its operation. As early as the mid-1950's the District of Columbia enacted a civil commitment law for narcotic addicts. Although this law was widely utilized in the first few years after it was enacted, it is seldom employed today.[50]

In reviewing the California legislation for civil commitment of narcotic addicts, Peter Belton points out that a variety of issues have arisen over the concept of eligibility for commitment, the discretion of the Director of Corrections to return the person committed to court, credit for time spent under commitment to the rehabilitation center, and appeal from the order of commitment.[51] Statistical reports on civil commitment of narcotic addicts in California have been published by the Research Division of the California Department of Corrections.[52]

Legal articles regarding civil commitment of addicts in New York have been critical of the statute, in that it fails to supply the alleged addict with the basic protections to which one in danger of losing his liberty is entitled, that narcotic addicts are being

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[46] Seaberg, Guy P. The drug abuse problems and some proposals. *Journal of Criminal Law, Criminology and Police Science*, 58(3):349-375, 1967.

[47] Joseph Herman. Heroin addiction and methadone maintenance. *Probation and Parole*, 1(1):18-40, 1969.

[48] U.S. Congress. House. Committee on the Judiciary. *Civil Commitment and Treatment of Narcotic Addicts: Hearings*. Washington, D.C., 1966. 465 pp.

[49] Sayler, Arch E. The Federal Narcotics Addict Rehabilitation Act of 1966. *Corrective Psychiatry and Journal of Social Therapy*, 14(4):224-229, 1968.

[50] U.S. Congress. Senate. District of Columbia Committee. *Staff Study on Drug Abuse in the Washington Area*. Washington, D.C.: U.S. Government Printing Office, 1969. p. 35.

[51] Belton, Peter J. Civil commitment of narcotics addicts in California: A case history of statutory construction. *Hastings Law Journal*, 19(3):603-665, 1968.

[52] California Corrections Department. Research Division. *Summary Statistics, 1967: Civil Commitment Program for Narcotic Addicts*. Sacramento: The Department, 1968. 85 pp.

treated as criminals,[53] and that the addict is being deprived of his liberty on merely a hope of effecting a lasting cure.[54] NCCD's policy regarding narcotic addicts is that a drug addict is a sick person and "should, therefore, have access to medical care, in or out of a hospital, without so-called civil commitment unless he is, in fact, unable to take care of himself despite medication. Whenever necessary, treatment facilities should be provided by communities."[55]

Civil Commitment of Chronic Alcoholics

The Task Force on Drunkenness of the President's Commission on Law Enforcement and Administration of Justice recommended that drunkenness should not in itself be a criminal offense, that adequate civil detoxification procedures should be developed, and that communities should establish detoxification units as part of comprehensive treatment programs. Such recommendations result from a multitude of factors including recent Supreme Court decisions on public drunkenness, the opinion of the medical profession that chronic alcoholism is a disease, and the inability of the criminal justice system to deter drunkenness or to meet the problems of the chronic alcoholic offender. The report of the Task Force states that "As presently constituted, the (criminal justice) system is not in a position to meet his (the chronic alcoholic's) underlying medical and social problems."[56]

That one system does not work to solve a problem does not justify the use of a different system which is both medically and legally unsound. Peter Hutt points out in an appendix to the Task Force report that compulsory treatment, which would supposedly follow involuntary civil commitment, is, from a medical viewpoint, unethical under principles long accepted by the American Medical Association. With regard to the constitutionality of involuntary civil commitment procedures, he writes that "there is no more constitutional basis for depriving a chronic alcoholic of his freedom to choose or reject medical treatment than there is for the involuntary treatment of any other ill person who is suffering from a noncontagious disease."[57]

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[53] Due process for the narcotic addict? The New York compulsory commitment procedures. *New York University Law Review*, 43(6):1172-1193, 1968.

[54] Steinau, Leslie. Commitment of the narcotic addict convicted of crime. *Albany Law Review*, 32(2):360-387, 1968.

[55] National Council on Crime and Delinquency. *Narcotic Law Violations: A Policy Statement*. New York: The Council, 1965. p. 13.

[56] U. S. President's Commission on Law Enforcement and Administration of Justice. *Task Force Report: Drunkenness*. Washington, D.C.: U.S. Government Printing Office, 1967. 131 pp.

[57] *Ibid.*, p. 117.

The results of several alcoholic treatment programs indicate that many chronic alcoholics will accept treatment voluntarily if it is offered them. The Manhattan Bowery Project is a voluntary treatment program for homeless alcoholics. Sixty-seven percent of the alcoholics approached voluntarily accepted treatment under the project. The first year's operation of its detoxification center demonstrated the need for a broader range of medical services to Bowery men and led to the creation of two other treatment facilities, an outpatient clinic and an emergency care unit. Despite setbacks, many patients are making the effort to get jobs, stay sober, and lead new lives.[58]

Another voluntary treatment program is in operation in Los Angeles County. Although younger men did not do well in the program, sixty-four percent of the men over forty showed favorable response to the voluntary rehabilitative setting.[59]

In Wayne County, Michigan, the Salvation Army makes shelter available for more than 600 persons daily, the majority of whom are indigent alcoholics. The Salvation Army has gained the confidence of the courts, which direct alcoholics from the criminal justice system to Salvation Army centers. As a result, it is estimated that the percentage of alcoholics in the Wayne County Jail population is approximately five percent, very low indeed. Although this effort is outstanding, the basic responsibility for the treatment and care of indigent alcoholics should be met by the governmental agencies which have the purpose of prevention and treatment of disease.[60]

What the Courts Are Doing

If the statutes have been criticized on legal grounds, what has been the attitude of the courts toward these alleged defects? The principal constitutional defects alleged are: (1) that due process in these proceedings is inadequate, (2) that treatment—the rationale of the proceeding—is not provided, (3) that the statutes are unconstitutionally vague, and (4) that they permit action by the State against an individual exceeding the police powers of the State.

With respect to due process, the courts have on occasion strictly

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[58] Criminal Justice Coordinating Council of New York City and Vera Institute of Justice. *In Lieu of Arrest: Manhattan Bowery Project: Treatment of Homeless Alcoholics.* New York: The Council. 9pp.

[59] Smith, Philip A. Nonpenal rehabilitation for the chronic alcoholic offender. *Federal Probation,* 32(3):46–50, 1968.

[60] National Council on Crime and Delinquency. *Adult Detention Needs in Wayne County, Michigan.* New York: The Council, 1968. 72 pp.

construed or condemned as inadequate a statute's procedural requirements.[61]

They have occasionally invalidated a particular commitment for failure of treatment.[62]

But they have not invalidated the statutes as vague,[63] or held them to exceed the police powers of the State.[64]

As in so much else, the Supreme Court is the final arbiter, and what it has done to date is to support the civil commitments in every substantial aspect. In *Powell* v. *Texas* in 1968, the Court said, "One virtue of the criminal process is, at least, that the duration of penal incarceration typically has some outside limit. . . . Therapeutic civil commitment lacks this feature; one is typically committed until one is 'cured'."[65]

One would think that the Supreme Court, having put its finger on a basic defect in civil commitments, might hold, or suggest, that under some circumstances, at least (where the civil commitment, for example, has no outside limit), civil commitments are improper and invalid. But, in *Powell* v. *Texas* there is nothing to suggest that the civil commitment statutes for drunkards should be reexamined, and suggestions made wherein they are defective. The existing statutes are not mentioned.

Indeed, the quoted statements are only dicta, and the Court has enunciated contrary dicta. When it dealt with drug addicts, in *Robinson* v. *California*, it said something else: "In the interest of discouraging the violation of such laws, [narcotic laws] or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement, and penal sanctions might be imposed for failure to comply with established compulsory procedures."[66] The two dicta contradict each other, as the holdings in these cases do. In *Robinson* v. *California*, the court held that the addict could not be criminally prosecuted for being an addict, if he did nothing (neither possessed drugs nor took

[61] Specht v. Patterson, 386 U.S. 605, 87 Sup. Cit. 1209 (1967); In re Raner 59 Cal. 2d 635, 381 P. 2d 638, 30 Cal. Rptr. 814 (1963); People v. Frontczak, 286 Mich. 51, 281 N.W. 534 (1938).

[62] In re Maddox, 351 Mich. 358, 88 N.W. 2d 470 (1957); State v. Wingler, 25 N.J. 161, 135 A. 2d 468 (1957); Commonwealth v. Page, 339 Mass. 313, 159 N.E. 2d 82 (1959); Milliard v. Cameron, 125 U.S. App. D.C. 383, 373, F. 2d 468 (1966); Whitree v. State, 56 Misc. 2d 683, 290 N.Y.S. 2d 486 (Ct. Cl. 1968); Rouse v. Cameron, 125 U.S. App. D.C. 366, 373 F. 2d 451 (1966); discussed, Birnbaum, Morton. A rationale for the right to treatment. *Georgetown Law Journal*, 57(4):752–781 (at 757), 1969.

[63] Mihm, Ferd Paul. A re-examination of the validity of our sex psychopath statutes in the light of recent appeal cases and experience. *Journal of Criminal Law, Criminology and Police Science*, 44(6):716–736, 1954.

[64] *Ibid.*, pp. 720–723.

[65] Powell v. Texas, 392 U.S. 514, 88 Sup. Cit. 2145 (1968).

[66] Robinson v. California, 370 U.S. 660, 82 Sup. Ct. 1415 (1962).

any); whereas in *Powell* v. *Texas*, it held that the alcoholic *could* be criminally prosecuted. If he *did* anything in that case, it was being drunk in public. Because of the contradiction, the dissenting judges in *Powell v. Texas* wanted to apply the *Robinson* concept and to hold that the alcoholic could not be criminally convicted.

But let us turn again to the dicta in *Powell*, for what it can reveal about commitment operations. The Court says, "There is no agreement among doctors and social workers with respect to the cause of alcoholism." The same is true with reference to drug addiction. "There is no generally agreed upon approach to the problem of treatment." Exactly the same is true of drug addiction. "There is yet no generally effective method for treating the vast number of alcoholics in our society." Exactly the same is true of treatment of drug addicts. "Facilities for the attempted treatment of indigent alcoholics are woefully lacking throughout the country." Again, exactly the same is true of facilities for attempted treatment of drug addicts.

The meaning of these statements is that such civil commitments are not justified; they exceed the police powers of the State. But the Supreme Court does not act on that analysis, just as in *Powell* it avoided applying *Robinson* in order to uphold jailing of alcoholics.

One other Supreme Court case may be cited, involving the sexual psychopath statutes. The case of *Minnesota ex rel. Pearson* v. *Probate Court* [67] involved a commitment under a 1939 statute which defined the term "psychopathic personality" as meaning "the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons."

Pearson was committed under this, and the Minnesota and United States Supreme Courts upheld it. What had Pearson done to be deemed a dangerous, committable person? None of the decisions reveal what he did! The statute did not require that the behavior be in violation of any criminal law. What behavior less than criminal had to be involved—harmful behavior? The statute is satisfied if the behavior is "likely" to inflict injury. What kind of injury? It could be "pain or other evil." The statute is totally vague, yet it is upheld.

The case reveals the present state of the law: if there is a pretense of treatment and if procedural due process is observed, the

[67] Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 60 Sup. Ct. 523 (1939).

courts look no further. Thus the Supreme Court said that the Minnesota statute uses the word "patient" four times, and that it required two duly licensed doctors of medicine to assist in the examination of the defendant. It pointed out that the defendant ("patient") had a right to be represented by counsel, could call witnesses, and could appeal—the same as in the commitment of an insane person.

However, what the courts fail to do is examine the exercise of the State's police power, that is, whether the statute permits intervention in the citizen's life. In the *Pearson* case, what kind of behavior was involved? It was not criminal behavior, but something less; it probably was not physically assaultive behavior. Was it masturbation that distressed his wife?[68] Was it foul language? Was *Pearson* parading nude in front of his wife and children? If it was any of these things, does the State have the power to intervene? It is not known, no one says, and presumably it does not matter. The case is regularly cited, without ever being examined.

In the *Robinson* case (drug addict), the Supreme Court said: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." But how about *civil* commitment of a person having a common cold—would not that also be cruel and unusual punishment? The question is inherent in the *Robinson* dictum about civil commitment of drug addicts: if it is beyond the police power of the State to criminally commit a drug addict, is it within the power of the State to commit in any form a person who is sick, but who is not a danger to himself or others (as Robinson was not)? There is no evidence that Pearson's sexual behavior was a danger to himself or others.

What the courts have done thus far is to look at the procedural due process in the civil commitments, and they are satisfied if they see what they consider to be adequate due process. As long as this attitude continues, the injustices of these statutes will continue. The change must come when courts, recognizing the injustices of the commitments, look at whether the State has the power to interfere in the private behavior or condition of people where they are committing no serious harm.

Such an approach is illustrated by a rare holding in the U.S. Court of Appeals for the District of Columbia, *Millard* v. *Harris*.[69] Millard was committed to a mental hospital under the District of Columbia sexual psychopath statute, one which does not require conviction of a criminal offense. Millard had exposed

[68] Masturbation did serve as the basis for commitment in another case under the same statute; Dittrich v. Brown County, 215 Minn. 243, 9 N.W. 2d 510 (1943).

[69] 373 F. 2d 468 (1966).

himself several times. The court found that indecent exposure did not endanger the public, although a highly sensitive woman might be shocked. The court said, "While the law must and does protect them like other citizens, there are limits on the extent to which the law can sweep the streets clear of all possible sources of occasional distress to such women."

The court did not question the criminal penalty, but the far more severe civil commitment, it held, was not justified. In this respect it relates to what the Supreme Court said in *Powell* v. *Texas*. The criminal conviction for disorderly conduct stands, but the more severe civil commitment should not be invoked where there is no real treatment available, and where no real danger to one's self or others is demonstrated. The difference between the cases is that *Powell* v. *Texas* did not invalidate any commitments; its dictum was only a base for upholding the criminal conviction. By contrast, the dictum in *Robinson* was useful in encouraging civil commitment statutes to be enacted. The distinction, the uniqueness of *Millard*, is that it *invalidated* a civil commitment, thus narrowing the application of the statute on the grounds that the statute went beyond the limits of police power inherent in all the statutes.

Conclusions

Special statutes under which so-called psychopaths, defective delinquents, sexual psychopaths, and sexually dangerous persons are civilly committed should be repealed, as they fail to perform the basic function for which they were enacted—they do not select persons on the basis of dangerousness. They should be repealed because of what they do accomplish—they allow for the indeterminate commitment of persons, many of whom are not dangerous, in some cases without a conviction of crime, without adequate regard for procedural due process. Rather than attempt to completely rewrite these statutes, they should be repealed in favor of the approach recommended by the National Council on Crime and Delinquency in its *Model Sentencing Act*. This approach provides for the selection, after conviction, of persons on the basis of dangerousness, those persons to be sentenced to terms adequate to protect society from future harm.[70]

Voluntary treatment programs for both narcotic addicts and chronic alcoholics are preferable to civil commitment procedures which function to deprive a person of his liberty without either adequate procedural safeguards or satisfactory treatment methods.

[70] *Op. cit., supra* note 33.

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